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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1619

FEDERAL POWER COMMISSION,

Petitioner,

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

No. 74-1608

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Cross Petitioner

v.

FEDERAL POWER COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

HOWARD A. GLICKSTEIN
Howard University Law School
2935 Upton Street, N.W.
Washington, D.C. 20008

WILLIAM L. TAYLOR
Catholic University Law School
Washington, D.C. 20064

REUBEN B. ROBERTSON III
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Counsel for Respondents in 74-1619 and Cross Petitioners in 74-1608

ABS DUPLICATORS, INC.—1728 Eye Street, N.W.—Washington, D.C.—298-6537

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OPINIONS BELOW

The opinion by the Court of Appeals (Cr. Pet. App. D)* is reported at 520 F.2d 432. The opinions and orders of the Federal Power Commission are found in 48 FPC 40 (Cr. Pet. App. B) and 48 FPC 371 (Cr. Pet. App. C).

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*"Cr. Pet." refers to the petition for certiorari in 74-1608.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The judgment of the United States Court of Appeals for the District of Columbia Circuit (Cr. Pet. App. E) was entered on February 5, 1975. Both parties received an extension of time up to and including June 20, 1975 for the purpose of filing a petition and cross petition for certiorari by orders dated May 2 and May 8, 1975. Cross petitioners in 74-1608 and petitioners in 74-1619 each filed on June 20, 1975. This Court granted both petitions on October 14, 1975 and consolidated the cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

U.S. CONST. amend. XIV, §1

> . . . . ; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL POWER ACT
16 U.S.C. 791a *et seq.*

Sections 4(e), 201(a), 205, 206 and 309 are set out in Cr. Pet. App. A.

NATURAL GAS ACT
15 U.S.C. 717 *et seq.*

Sections 1(a), 4(a)–4(e), 5(a), 5(b), 7(a), 7(c) and 7(e) are set out in Cr. Pet. App. A.

QUESTIONS PRESENTED

By the Federal Power Commission in 74-1619:

1. Whether the Federal Power Commission correctly determined it has no authority to consider coincidentally to the performance of its regulatory functions under the Federal Power Act, 16 U.S.C. 791a, *et seq.* and the Natural Gas Act, 15 U.S.C. 717, *et seq.* evidence that a regulatee is a demonstrated discriminator in its employment relations.

By NAACP et al. in 74-1608:

1. Whether the Federal Power Commission, pursuant to its mandate to regulate in the "public interest," has both statutory authority and responsibility broadly to proscribe employment discrimination in the industries it regulates.

2. Whether, having found that the Federal Power Commission had jurisdiction over employment discrimination for the limited purpose of protecting consumers from illegitimate costs, the court below erred in refusing to require the agency to adopt rules to effectuate its jurisdiction.

3. Whether the Federal Power Commission, by reason of its extensive involvement in the regulation of the gas and electric utility industries, has a Constitutional duty to proscribe employment discrimination by the companies it regulates.

STATEMENT

A. Proceedings Before the Federal Power Commission

In response to evidence of widespread employment discrimination by the gas and electric utility industry, respondents,** a group of civil rights, public interest and employee organizations,[1] petitioned the Federal Power Commission on June 22, 1972 to hold rulemaking proceedings with respect to discrimination by its regulatees (J.A. 3-53). The petition, filed under subsection (b) of section 1.7 of the Commission's Rules of Practice and Procedures, 18 C.F.R. §1.7(b), included as required by that subsection a proposed rule (J.A. 42-48), which was modeled on rules enacted by or proposed to other agencies such as the Federal Communications Commission. See 47 C.F.R. §21.307.

The petition filed with the FPC alleged the existence of substantial and widespread discrimination in the gas and electric utility industry—an industry which in 1970 provided 634,000 jobs. (J.A. 4, 11). Citing statistics compiled by the Equal Employment Opportunity Commission, the petition summarized the position of minorities

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**NAACP *et al.* are referred to throughout as "respondents" rather than cross petitioners and respondents.

[1] The groups included: The National Association for the Advancement of Colored People, The National Urban League, The Mexican American Legal Defense and Educational Fund, The National Organization for Women, The Women's Equity Action League, The League of United Latin American Citizens (in California), The Association for the Betterment of Black Edison Employees, The Office of Communications of the United Church of Christ, The Center for Community Change, The American G.I. Forum (in California), The Mexican American Political Association and United Native Americans, Inc.

and women in the gas and electric industry (J.A. 19-20): (1) The black participation rate in this industry is the lowest (6.1%) among the twenty-three industries reporting employment of 500,000 or more; (2) One-third of all utility establishments filing EEO-1 reports with the EEOC in 1970 had no black employees. In only three of twenty large SMSAs (standard metropolitan statistical areas) did the black participation rate in utilities approach or exceed the participation rate for all industries in the area. In eight of the same twenty SMSAs, the all-industry black participation rate was at least double the black participation rate in local utilities; (3) In 1970, Spanish Surnamed Americans held 3.6 percent of all jobs reported in the EEO-1 nationwide survey, but only 1.6 percent of all jobs in the utilities industry. Spanish Surnamed Americans held less than 1 percent of the official, managerial, professional and sales jobs and only 1.5 percent of all technicians jobs; (4) In many SMSAs Spanish Surnamed Americans have relatively low participation rates in the utilities industry when compared to their participation rate in all industries in the local labor market. For example, in the city of Chicago Spanish Surnamed Americans held 0.4 percent of the jobs in the gas and electric utilities at the same time that they held approximately 5 percent of all jobs in the Chicago area; (5) While women held 34 percent of the positions reported in EEOC's overall survey in 1970, only 15 percent of this industry's employees were female. Nine of every ten females employed in the industry were clerical workers. Less than 2 percent of the blue collar jobs were held by women.

Further, the petition noted the large number of pending or decided cases alleging discrimination in gas and utility companies (J.A. 20-22).[2]

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[2] That petition included a compilation of 75 cases. *See also, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Jersey Central Power*

[footnote continued]

Respondents argued that ample evidence existed to permit the FPC to take action under its authorizing statutes which require the Commission to safeguard the public interest by regulating the interstate wholesale transportation, transmission and sale of electric energy and natural gas (J.A. 24-26). In performing its duties, the Commission, *inter alia*, grants certificates of public convenience and necessity to companies which transport or sell natural gas or who undertake construction, licenses hydroelectric plants, scrutinizes mergers, authorizes sales or abandonment of facilities and regulates the rates for gas and electricity in interstate commerce (J.A. 24-26). Respondents argued that, there being a national policy against employment discrimination, the FPC should consider such a fundamental policy in its determination of what is in the "public interest" (J.A. 23-24). They claimed, moreover, that the Constitution requires such consideration, lest the Federal government become a partner to private discriminatory actions (J.A. 3-37). Accordingly, they called upon the FPC to initiate rulemaking proceedings to prohibit employment discrimination. Specifically, they prayed that the Commission (J.A.

[footnote continued from preceding page]

& Light Co. v. Local 327, I.B.E.W., 508 F.2d 687 (3d Cir 1975); *Rosen v. Public Service Elec. Co.*, 477 F.2d 90 (3d Cir. 1973); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *Georgia Power Co. v. EEOC*, 412 F.2d 462 (5th Cir. 1969); *Jenkins United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968); *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973). *modified sub nom., EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *United States v. Philadelphia Elec. Co.*, 351 F. Supp. 1394 (E.D. Pa. 1972); *Phillips v. Columbia Gas of West Virginia, Inc.*, 347 F. Supp. 533 (S.D. W.Va. 1972), *aff'd*, 474 F.2d 1342 (4th Cir. 1973); *United States v. Virginia Electric & Power Co.*, 327 F. Supp. 1034 (E.D. Va. 1971); *Moreman v. Georgia Power Co.*, 310 F. Supp. 327 (N.D. Ga. 1969); *Clark v. Georgia Power Co.*, 310 F. Supp. 538 (N.D. Ga. 1969).

5-6): (1) Prescribe regulations prohibiting discrimination on account of race, color, religion, sex and national origin and assuring equal opportunity in the employment practices of its regulatees; (2) Set public hearings and permit oral argument on such proposed rule; (3) Initiate a notice and comment rulemaking proceeding with respect to such proposed rule; and (4) Grant such other relief as it deemed necessary.

On July 11, 1972, acting with unusual alacrity, the FPC dismissed the petition for rulemaking (J.A. 54-75). The Commission concluded that it lacked delegated statutory authority to regulate discriminatory practices by its regulatees and that neither general executive authority nor constitutional considerations provided a basis for such jurisdiction (J.A. 55-56). According to the Commission, to ascertain its jurisdiction under its public interest powers, it had to rely exclusively on the legislative history of the Federal Power Act and the Natural Gas Act, which it concluded to be the "economic regulation of entrepreneurs engaged in resource developments" (J.A. 59). The Commission did not find the necessary nexus between employment and economic activities to justify the exercise of jurisdiction (J.A. 59 and 61).

The Commission's opinion distinguished employment discrimination from other subjects such as national defense, antitrust, environmental requirements, navigation, flood control or recreation, all of which are "reflected" in the Natural Gas and Federal Power Acts (J.A. 59). Taking jurisdiction would, in the opinion of the Commission, justify regulating "the securities, the taxes, the patents, the safety, the wages and hours, the advertising" of utilities (J.A. 61).

Although respondents referred to federal and state legislative and executive enactments outlawing employment

discrimination as evidence of the national policy against such discrimination (J.A. 23-24), the Commission interpreted the petition as arguing that such legislation conferred enforcement obligations on the Commission (J.A. 61-64). In reviewing the laws and regulations in this area, the Commission did not find that any of these statutes conferred jurisdiction on it (J.A. 61-67). On the contrary, it found the authority of other agencies "exclusive" (J.A. 74).

Finally, the Commission denied that its failure to regulate employment constituted federal support for discrimination (J.A. 68). The Commission emphasized its support for the principle of nondiscrimination and said that it would give such duties highest priority if they were assigned to it (J.A. 72).

On August 8, 1972, respondents petitioned the FPC for a rehearing (J.A. 83-89). Attached to the petition for rehearing was a letter from William H. Brown, III, then Chairman of the Equal Employment Opportunity Commission, dated July 13, 1972, to John N. Nassikas, then Chairman of the Federal Power Commission, supporting the petition for rulemaking and requesting an opportunity to participate in any formal proceedings arising out of the petition (J.A. 87-89). Chairman Brown stressed the pervasiveness of discrimination in the gas and electric utility industry, called attention to hearings on the problem conducted by the EEOC,[3] noted that the House Judiciary Committee had held similar hearings[4] and reminded the

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[3] *See* U.S. Equal Employment Opportunity Commission, *Promise v. Performance* (1972).

[4] *See Hearings Before the Civil Rights Oversight Subcommittee of the House Comm. on the Judiciary*, "Responsibilities of the Federal Power Commission in the Area of Civil Rights," 92d Cong., 2d Sess. (1972) [*Hearings*].

FPC that the United States Department of Justice,[5] the United States Commission on Civil Rights,[6] as well as the EEOC, had expressed the view that the FPC should undertake regulation of the employment practices of the regulated utilities industry (J.A. 87-88). Chairman Brown concluded (J.A. 89):

> The major public policy considerations which are involved in equal employment opportunity require that all segments of the Federal Government responsible for insuring the public interest act to eliminate the undesirable effects of employment discrimination. The Commission would look forward to cooperating with the FPC in this vital area and would be glad to provide whatever assistance you may feel necessary in the development of an equal employment opportunity program for the utilities industry.

On August 21, 1972, the FPC denied the petition for rehearing (J.A. 90-91).

B. Proceedings Before the Court of Appeals.

Respondents obtained review before the United States Court of Appeals for the District of Columbia.[7] On

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[5] *See* J.A. 27-32.

[6] *See* U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort 361 (1970).

[7] The Equal Employment Opportunity Commission filed a brief *amicus curiae* in support of respondents' argument that FPC has both the authority and duty to consider evidence of widespread discriminatory employment practices by its regulatees. *See generally* Brief for EEOC as Amicus Curiae, NAACP *et. al.* v. Federal Power Commission, 520 F.2d 432 (D.C. Cir. 1975).

February 5, 1975, that court issued an opinion and judgment vacating the order of the Federal Power Commission and remanding the case for further proceedings (Cr. Pet. App. D).

The Court of Appeals gave a narrow interpretation to the "public interest" mandate of the FPC. It concluded that "Congress has not charged the Commission with advancing *all* public interests, but only the public's interest in having the particular mandates of the Commission carried out, its interest, in other words, in the conservation of natural resources and the enjoyment of cheap and plentiful electricity and natural gas" (court's emphasis) (Cr. Pet. App. D at 19). The court also concluded that Congress had "centralized responsibility for [employment discrimination] in the Equal Employment Opportunity Commission" (Cr. Pet. App. D at 21). Accordingly, the court ruled that Congress did not intend "for the Commission to entertain and to adjudicate individual complaints of employment discrimination by its regulatees, and to impose sanctions unrelated to the performance of its central regulatory purposes" (Cr. Pet. App D. at 24-25).

At the same time, the court recognized that there were circumstances in which the discriminatory practices of a regulatee were related to the FPC's objectives. The court indicated that a regulatee's discriminatory employment practices could reasonably be related to the pursuit of the Commission's statutory objectives and could appropriately provide the occasion for its issuance of rules (Cr. Pet. App. D. at 25). The court elaborated on its reasoning (Cr. Pet. App. D. at 25-26):

> The Commission's task in protecting the consumer against exploitation can be alternatively described as the task of seeing that no

> unnecessary or illegitimate costs are passed along to that consumer. Costs incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility. Without attempting an exhaustive enumeration of such costs, we identify at least the following as indicative of those arguably within the Commission's range of concern: (1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proved that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination, (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion.

Although the court suggested some areas in which rulemaking would be appropriate, it did not require the Commission to adopt rules related to employment discrimination, but left this question to the discretion of the Commission (Cr. Pet. App. D at 31-33). The Court, in addition, did not address itself with any certainty to respondents' constitutional arguments. Contrary to the statement of petitioner (Pet. Br. at 8), the court did not find that the Commission had no constitutional obligation to impose nondiscrimination requirements on its regulatees. Rather, it expressed a doubt as to whether the Commission

had to undertake this obligation affirmatively (Cr. Pet. App. D at 31), stated that the agency was not constitutionally required to adopt a rule of the breadth proposed by respondents and left the question for future resolution if necessary (*id.* at 32). In remanding the case for further proceedings, the court made clear that the FPC could not deny respondents' request on grounds that the agency had no authority to promulgate rules relating to employment discrimination (Cr. Pet. App. D at 32) and suggested, but did not hold, that the FPC might validly temporarily defer rulemaking in favor of a case-by-case approach until it gained further experience in dealing with employment discrimination (*id.* at 33).

SUMMARY OF ARGUMENT

The court below was correct in holding that discrimination in employment by regulated utilities is relevant to the duties of the Federal Power Commission under the Federal Power Act and the Natural Gas Act and thus may not be ignored by the Commission. This Court has consistently interpreted those statutes as embracing all important aspects of national policy that may be affected by the FPC's actions or that are related to its basic purposes. *Atlantic Refining Co. v. FPC, Gulf States Utilities Co. v. FPC, Udall v. FPC.*

The mandate of equal employment opportunity for all citizens is a paramount national policy that has a direct bearing on and relationship to the duties of the Commission. When the Commission closes its eyes to job discrimination by the companies it regulates, it abdicates its responsibility to safeguard consumers against undue costs being included in their rates. These costs of employment discrimination are real and substantial: they include back pay awards, the potential magnitude of which can be

gauged by the extremely large sums already assessed in litigation against utilities and other companies; potential monetary liabilities in the form of prospective wage relief and attorneys' fees; losses in productivity and efficiency that result from arbitrary exclusion of an important segment of the workforce (which the Council of Economic Advisors and others have estimated at $20 billion yearly for all industries); and further losses in productivity stemming from the demoralizing effects of discrimination on employees. In a related context, the interest of the government in averting such costs to the nation has been held sufficient to justify action to prevent job discrimination on federally assisted construction contracts, even absent specific statutory authorization.

Commission authority to consider the undue costs and adverse effects of discrimination must go beyond the ratemaking context, for if it were so confined the agency would face unacceptable alternatives: either to let ratepayers absorb the costs of job bias, contrary to the statute, or to impose such costs on the utility and its shareholders, which could impair the company's financial health. The agency can best deal with this problem by taking basic preventive steps, such as the use of its ample authority to attach appropriate conditions to licenses and certificates of public convenience and necessity, in order to assure that recipients will act legally and in conformity with the public interest.

The FPC does not appear to contest the existence of a statutory duty to prevent undue costs from being passed on to consumers; it would be hard put to do since its enabling statute requires that it examine and alter unjust or unduly discriminatory practices that affect utility rates. Nor can the agency argue effectively that dealing with job discrimination is the exclusive province of the Equal

Employment Opportunity Commission. The legislative history of Title VII specifically repudiates any notion that Congress intended to vest enforcement authority solely in the EEOC. And practical experience has demonstrated that implementation of the national policy against job discrimination works best and most efficiently when the EEOC is able to enlist the support and cooperation of other federal agencies, as it has sought to do in the case of the FPC.

Rather, the FPC appears to rest its defense almost entirely on the non-jurisdictional contention that assumption of its duty to deal with job discrimination by utilities would impose an undue administrative burden. But the apprehensions it voices are both unsupported and unjustified. An agency called upon to play a supportive role in the implementation of national policy can carry out its responsibility through a variety of mechanisms—obtaining basic information and statistics to monitor the industry, availing itself of the expertise of the primary agency and making its own expertise available to the primary agency, and attaching appropriate conditions to licenses and contracts, to mention just a few. The courts have endorsed such pragmatic approaches by the FPC in a similar context. *Alabama Power Co. v. FPC.* And the experience of the Federal Communications Commission in dealing with job discrimination by its regulatees demonstrates concretely that the duty can be handled successfully without deflecting the agency from its primary tasks.

Accordingly, the reasoning of the court below was sound and its decision correct. It erred in only two respects: (1) in unduly restricting the discretion of the FPC to select the best means of implementing its duty by

holding that certain methods of implementation were "beyond the Commission's power;" and (2) by failing to require the FPC to issue a rule articulating, at a minimum, its basic policy against discrimination and the general procedures it will employ to implement that policy. As to the first point, we simply contend that the court's ruling was premature, because it should be left to the agency in the first instance to determine the necessary and appropriate contours of the specific regulations to be enacted. The latter requirement would hardly interfere with the FPC's discretion in determining how best to proceed; it would simply conform with basic precepts of fair notice embraced in the Administrative Procedure Act, particularly needed when an agency is reversing past policies that have broad impact on the public.

If this Court should differ with the court below on the issue of statutory responsibility, it would be compelled to resolve serious constitutional issues. For the FPC to undertake a general duty to protect consumers from undue costs, but to abjure responsibility for dealing with costs attributable to discrimination, amounts to a singling out of race problems for disfavored treatment. In this and in other aspects of its pervasive and inextricable involvement with private utilities, the FPC reinforces and supports private discrimination. Perhaps the test of "state action" would be more rigorous if the interests at stake were of a nonracial nature or if a far-reaching intrusion into private activity were sought. But where, as here, discrimination is the issue, this Court, mindful of the original thrust of the Fourteenth Amendment, has been consistent and scrupulous in condemning every distinction based on race.

ARGUMENT

I.

DISCRIMINATION IN EMPLOYMENT BY NATURAL GAS AND ELECTRIC POWER UTILITIES IS RELEVANT TO THE REGULATORY DUTIES OF THE FEDERAL POWER COMMISSION UNDER THE FEDERAL POWER ACT AND THE NATURAL GAS ACT.

A. The Federal Power Commission's Responsibility Requires it to Consider National Policies Affected by its Actions Including Those not Expressly Listed in its Enabling Statutes.

The Federal Power Commission contends that, however strong the national policy against employment discrimination may be and however poor the posture of its regulatees, there is literally nothing the FPC can do about it, because employment practices are excluded from its range of permissible concerns. This extremely narrow view of its public interest mandate is in conflict with holdings of this Court which have consistently construed the Federal Power Act and the Natural Gas Act as embracing *all* important aspects of public policy that may be affected by the Commission's actions, or related to its basic purposes. As this Court has stated, the law "requires the Commission to evaluate all factors bearing on the public interest." *Atlantic Refining Co. v. FPC*, 360 U.S. 378, 391 (1959); *FPC v. Transcontinental Gas Corp.*, 365 U.S. 1 (1961). *See also, e.g., City of Chicago v. FPC*, 385 F.2d 629 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); *City of Pittsburgh v. FPC*, 237 F.2d 741 (D.C. Cir. 1956).[8]

[8] The Court has ruled frequently that administrative agencies, in carrying out their regulatory responsibilities, must consider and [footnote continued]

The narrow view of the public interest that the agency advances here has not met with success in this Court in the past. In *Gulf States Utilities v. FPC*, 441 U.S. 747 (1973), the Court rejected the argument that the FPC's responsibilities do not include consideration of possible anti-competitive consequences flowing from the issuance of a security. Similarly, in *Udall v. FPC*, 387 U.S. 428 (1967), this Court refused to accede to the FPC's limited view of its duty to serve the public interest in licensing a hydroelectric power project, requiring FPC to consider the impact of the project on national conservation policy, despite the fact that conservation policy was articulated in other legislation. In each case the existence of national policy on matters that were related to the agency's discharge of its duties required the FPC to look beyond the parameters of its own statute to protect the public interest.[9]

[footnote continued from preceding page]
promote national objectives beyond those expressly set forth in their statutes. For example, in *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), the National Labor Relations Board declined to consider whether a work stoppage violated Federal criminal law. This Court condemned this myopic approach and said, *id.* at 47:

> ... the [National Labor Relations] Board has not been commissioned to effectuate the policies of the Labor Relations Act so singlemindedly that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

See also Denver & R.G. W. R.R. v. United States, 387 U.S. 485 (1967); *FMC v. Svenska Amerika Linien*, 390 U.S. 238 (1968).

[9] In addition to being required to look beyond its own statute to consider national antitrust and environmental policies, the Commis-
[footnote continued]

It is in the context of this articulation of the public interest–a definition neither so broad as to encompass extraneous matters, however important, nor so narrow as to exclude from consideration the diverse impact of agency action on citizens–that this case must be considered.

That the assurance of equal employment opportunity for all, free from discrimination based on race, color, religion, sex or national origin, is a national policy "of the highest priority," can hardly be disputed. *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). With roots in the Declaration of Independence. this abiding commitment to fairness and equality has been most explicitly articulated by Congress in Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352. 78 Stat. 253, 42 U.S.C. §2000e *et. seq.*, supported by this Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-801 (1973); and *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-431 (1971); reaffirmed by the Equal Employment Opportunity Act of

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sion has been told to consider matters related to national defense. *See National Coal Ass'n v. FPC*, 191 F.2d 462 (D.C. Cir. 1951); *City of Pittsburgh v. FPC*, 237 F.2d 741 (D.C. Cir. 1956). Other administrative agencies have had national labor policies and health considerations encompassed within their duty to promote the public interest. *See Retail Store Employee Union v. FCC*, 436 F.2d 248 (D.C. Cir. 1970); *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968). Judge Burger, as a member of the United States Court of Appeals for the District of Columbia Circuit, ruled that racial discrimination is a factor that a non-civil rights administrative agency must consider in effectuating the public interest. *See Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994, 1007 D.C. Cir. 1966), where the court held that programming misconduct which included charges of racial discrimination and some elements of religious discrimination "would preclude, as a matter of law, the required finding that renewal of the license would serve the public interest."

1972, Pub. L. No. 92-261, 86 Stat. 103, 42 U.S.C. §2000e *et. seq.* and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The national policy against invidious employment discrimination finds expression in other statutes and regulations as well, including Section 1 of the Civil Rights Act of 1866,[10] the Equal Pay Act,[11] the Federal labor laws,[12] executive orders covering government and federal-aid contractors and subcontractors,[13] rules issued by regulatory agencies,[14] and the laws of at least 40 states[15] and numerous cities and municipalities.

The FPC does not contend that equal employment opportunity is not a fundamental national policy and part of the overall public interest. Rather, the FPC takes the

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[10] 42 U.S.C. §1981. See *Johnson v. REA*, 421 U.S. 454 (1975).

[11] 29 U.S.C. §206.

[12] The Railway Labor and National Labor Relations Acts (45 U.S.C. §§151-162; 29 U.S.C. §§151-168) require unions certified as exclusive bargaining representatives to represent fairly all employees in the unit; *see Vaca v. Sipes*, 386 U.S. 171 (1967); *Syres v. Oil Workers International Union*, 350 U.S. 892 (1955); *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944); and proscribe as unfair labor practices racial discrimination by unions or employers; *see United Packinghouse, Food & Allied Wkrs., Int'l Union v. NLRB*, 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 903 (1969); *Local Union No. 12, United Rubber Co., L & P Wrkrs v. NLRB*, 368 F.2d 12 (5th Cir. 1961), *cert. denied*, 389 U.S. 837 (1967); *Independent Metal Workers Union, Local 1 (Hughes Tool Co.)*, 147 NLRB 1573 (1964).

[13] Executive Order 11,246, as amended, 3 C.F.R. 169 (1974). *See Farkas v. Texas Instrument Inc.*, 375 F.2d 629 (5th Cir. 1967); *Farmer v. Philadelphia Elec. Co*, 329 F.2d 3 (3d Cir. 1964).

[14] *See, e.g.;* 47 C.F.R. §21.307 (FCC); 12 C.F.R. §528.7 (FHLBB).

[15] *See* J. A. 23-24; Lab. Rel. Rep. FEP Manual 451:21-26 (1975).

position that equal employment opportunity is not part of that particular corner of the public interest which it is assigned to protect. The agency is unable to see the slightest relationship between its duties under the Federal Power Act or the Natural Gas Act and the policies expressed in civil rights laws. "Since Congress did not make the eradication of employment discrimination an object of the Commission's enabling statutes", it argues, "the Commission has no powers or duties in this area. The Commission can do no more or no less than what Congress has authorized it to do." Pet. Br. at 17.

Fortunately, the Court of Appeals accurately perceived the clear connections between unlawful discrimination in the employment practices of FPC regulatees and the essential purposes of the enabling legislation. As the following discussion shows, this relationship is so concrete and its consequences so manifest that the Commission has a duty to take appropriate steps to deal with employment discrimination by the companies it regulates.

B. Employment Discrimination Has a Direct Bearing on the Federal Power Commission's Regulatory Activities.

1. Consumer Protection From Undue Costs

First, violation of the fair employment practices laws and remediation thereunder involves distinct costs to consumers. These include the following:

—*Backpay*. One central purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co. v. Moody*, *supra* at 418. Without excluding other types of compensatory

damages,[16] Title VII provides that backpay to compensate for lost wages may be awarded on a class basis to the victims of discriminatory practices, even absent exhaustion of administrative procedures by unnamed class members. *Id.* at 414 n.8. Consonant with the purposes of this law, denial by a court of a backpay award must be supported by good and sufficient reasons. *Id.* at 417.[17]

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[16] For example, compensatory damages for past discrimination may be claimed independently under 42 U.S.C. §1981. See *Johnson v. REA*, 421 U.S. 454 (1975).

[17] Back pay awards involve significant sums of money. In fiscal year 1975, the EEOC and state and local fair employment agencies achieved conciliation settlements that provided monetary benefits of nearly $111 million. *See* CCH Labor Law Reports, No. 96 (Nov. 20, 1975). The initial calculation of back pay under the consent decree against the steel industry amounted to $30,940,000. See G. Ginsburg, Cases and Materials on Equal Employment 334 (1974). The consent decree against the Bell system is discussed in note 18, *infra*. In *U.S. v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973), black victims of discrimination were awarded more than $2,000,000, including $1,750,000 in back wages, over $90,000 in back per diem for travel and living expenses and over $200,000 in additional pension benefits. This was the first case of pension relief in an employment discrimination case. See Ginsburg, *supra* at 191. In a sex discrimination case against the Bank of America, a consent decree was entered into which provided that $3,750,000 would be put into trust over a five-year period to induce women employees to undertake management training and to prepare them for higher management positions. *Id.* at 341. Recoveries under the Equal Pay Act also can be of extreme economic consequence. Without resort to litigation, the Department of Labor secured the restoration to employees of $6,841,443 in underpaid wages in fiscal year 1974 and of $4,626,251 in fiscal year 1973. *See* U.S. Commission on Civil Rights, V The Federal Civil Rights Enforcement Effort–1974 441 n.1366 (1975). Litigation produced additional recoveries of $16,914,967 in fiscal year 1974 and $10,914,967 in fiscal year 1973. *Id.* at 456.

–*Prospective relief.* Under both Title VII and 42 U.S.C. §1981 the courts have broad equitable powers to fashion prospective relief that will eliminate the continuing effect of past discrimination. For example, where individuals have been wrongfully denied promotion into higher-paying positions that have been filled by others, they may be awarded "forward pay" relief at the higher rates without actually changing jobs at that time. This, in effect, is a form of interim reparations pending the achievement by victims of discrimination of their "rightful place" in the future. *See* G. Cooper, H. Raab and H. Rubin, Fair Employment Litigation 463-64 (1975). Similarly, "red circling," or rate-retention for transferees to entry-level jobs in other progression lines, may be ordered in appropriate cases. *See, e.g., United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971). In each case, the remedy involves payment of "duplicative" wages, *i.e.*, for work that is not really being performed by the employee.

–*Litigation costs.* The major but by no means only costs in this category are attorneys' fees. In many cases defendants must bear not only their own fees and related costs of representation but also those of their antagonists in the litigation. *See, e.g., Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). Such costs are very real and quantifiable consequences that may flow from violations of the civil rights laws, and they may involve substantial sums amounting to many millions of dollars.[18]

In addition discrimination entails non-remedial costs, definable in terms of diminished labor productivity and

[18] The potential costs of compliance with the equal employment laws by utilities are demonstrated by the January, 1973 consent

efficiency, that are attributable to the effects of the discriminatory practices themselves rather than their legality. One need not embrace an "invisible hand" theory[19] to understand that any system which arbitrarily excludes a substantial part of the potential workforce, regardless of qualifications, will be less efficient in the long run than one which makes use of all available manpower resources.[20] The Council of Economic Advisors noted in 1965 that "[d]iscrimination against minorities—Negroes, Puerto Ricans, Spanish-Americans, Indians, and others—has significant economic and social costs. It is estimated that

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decree entered in *Equal Employment Opportunity Commission v. American Tel. & Tel. Co.*, Civil No. 73-149 (E. D. Pa. 1973), reprinted in 1 CCH Empl. Prac. Guide ¶1860 at 1533-3. As the District Court later noted in that litigation, the settlement is a "monumental" one which "goes to the very heart of the system—money, goals, timetables, affirmative action programs, employee information programs, compliance monitoring, pay adjustments, new transfers and immediate promotion options." *EEOC v. AT & T*, 365 F. Supp. 1105, 1108 (E.D. Pa. 1973), *aff'd*, 507 F.2d 735 (3d Cir. 1974). A supplemental consent decree was entered in that proceeding in March, 1974. Records of the EEOC indicate that the Bell System's compliance with these decrees during 1973 and 1974 involved out-of-pocket expenditures in excess of $110 million, including $20 million in non-recurring backpay awards and annually recurring costs of more than $50 million.

[19] *Cf.* Brief in this proceeding for Edison Electric Institute as Amicus Curiae at 16, n.31.

[20] G. Becker, The Economics of Discrimination, ch. 3 (1971); P. Samuelson, Economics, An Introductory Analysis, chs. 25, 27 (6th ed. 1964); M. Friedman, Economics and Freedom, 108-110 (1967). *See also* Boyle, *Equal Opportunity for Women is Smart Business*, 51 Harv. Bus. Rev. 85 (1973); U.S. Dept. of Labor, Final Report, Tri-Faith Trucking Terminal Employment Project, Contract No. 83-15-68-51 (1971).

society loses up to $20 billion per year of potential production as a result of employment discrimination and poorer educational opportunities for nonwhites."[21] After a lengthy analysis, Professor Lester Thurow of the Massachusetts Institute of Technology reached a similar conclusion: "[d]iscrimination causes a large reduction in the potential level of output of the American economy. Negro economic resources are not fully utilized and white resources are inefficiently utilized as a result of discrimination. Efficiency losses amount to approximately $19 billion per year."[22] Significantly, it is precisely to prevent government suppliers and contractors from "increasing [their] costs and delaying [their] programs by excluding from the labor pool available minority workers" that the government's power to extend equal employment opportunity requirements to federally-assisted state construction projects has been found justified, even absent specific

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[21] Council of Economic Advisors, Economic Report of the President 167 (1965). With respect to sex discrimination: "job bias costs American women tens of billions a year in foregone wages, and costs the nation as a whole billions more in lost economic output." *Business in Brief*, No. 108, February 1973 (Published by Chase Manhattan Bank and quoted in R. Covington, Labor Relations and Social Problems, Discrimination in Employment 20 (2d ed. 1973)).

[22] L. Thurow, Poverty and Discrimination 158 (1969). *See also* U.S. Civil Commission on Civil Rights, *Statement on SPDR-30, Advance Notice of Proposed Rule Making on Discrimination in Airline Employment, CAB Docket No. 24636,* (Sep. 1972) at 3-4:

> Employment discrimination gives rise to inefficiency. Excluding a group of qualified potential applicants creates an artificial restriction on the labor force which would otherwise be at the employer's disposal. This may tend to inflate wages, limit the quality of work performance, and result in preventing the employer from realizing an optimum return on labor cost expenditures.

statutory authorization. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971). The court there stated, *id.* at 171:

> In direct procurement, the federal government has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects. It has an identical interest with respect to federally-assisted construction projects.

See also United States v. Mississippi Power & Light Co., 10 FEP Cases 1084 (S.D. Miss. 1975). Similarly, inefficiencies may also result from the demoralizing effects of discriminatory employment and promotional practices upon employees who are disadvantaged by them.[23] The United States Court of Appeals for the District of Columbia Circuit has noted that "Senate and House hearings on equal employment bills are laced with references to the degradation, disillusionment, lack of motivation, and lessening of incentive to improve which result from racial discrimination in employment (footnote omitted)" *United Packinghouse, Food & Allied Workers, International v. NLRB*, 416 F.2d 1126, 1137 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969).

The difficulties inherent in measuring such costs precisely do not make them any less real or substantial, or any more proper a burden to impose upon consumers.[24]

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[23] *See* M. Levine, The Untapped Human Resource: The Urban Negro and Employment Equality 133-34 (1972). *See also Miller v. International Paper Co.*, 408 F.2d 283, 294 (5th Cir. 1969).

[24] Expert testimony presented by the EEOC in proceedings before the Federal Communications Commission based on a study of

[footnote continued]

Even without quantification, it is likely that the loss of efficiency and productivity caused by discrimination in employment involves costs to the public that exceed even those that stem from liability under Title VII or similar litigation. The views of the General Services Administration, the agency which is responsible for protecting the federal government's interest as a consumer of electric power, are worth noting in this regard:

> GSA believes the employment practices of a regulated monopoly to be a proper issue in rate increase proceedings. The regulated company's discriminatory employment practices may have substantially and unreasonably increased the cost of providing the service during the test period used in the proceeding for rate-making purposes, and, if so, this issue should be raised for Commission consideration.
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> Disregarding the individual jurisdiction and power of the Commission in question, an employment practice issue could be raised directly in any proceeding by presenting it in the posture of traditional cost of service approach. While it would be difficult to establish an adequate record in this area, certain connections between the utility's employment practices and its cost of service could be shown. For example,

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long-distance telephone service concluded that rates were two to four percent higher as a result of AT & T's discrimination against women. Statement of Dr. Orley Ashenfelter, Director, Institute of Industrial Relations, Princeton University, EEOC Exhibit 5 in FCC Docket 19143 (December 1, 1971).

> to the extent a company engages in unfair hiring and promotion practices, such acts would have a cost of service effect, especially in wage and salary expense. In this respect, certain expenses could be disallowed. Moreover, since such practices most certainly effect the utilities' overall efficiency, the rate of return granted to the utility could be established at the lower end of the zone of reasonableness. Quite frequently, utilities contend excellent efficiency warrants a rate of return fixed at the high end of the zone of reasonableness or a small extra return allowance.[25]

No one disagrees with the Court of Appeals' conclusion that protecting consumers from improper or unnecessary costs of gas and electric utilities—effectively keeping rates at the lowest reasonable levels—is one of the FPC's major obligations. Indeed, the Commission itself concedes that it must disallow costs that are "unnecessary or illegitimate," including costs arising from or associated with conduct that violates other laws governing economic activity. Pet. Br. at 12, 25-26. Having said this much, however, the Commission refuses to take the logical next step by acknowledging that costs arising from or associated with illegal discriminatory hiring practices must also be excluded from the rates of its regulatees.[26] Quite obviously these costs are not necessarily

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[25] Letter from Harold S. Trimmer, Jr., Acting Administrator, General Services Administration, to Rep. Don Edwards, *Hearings Before the Civil Rights Oversight Subcommittee of the Comm. on the Judiciary*, "Responsibilities of the Federal Power Commission in the Area of Civil Rights", 92d Cong., 2d Sess., 148 150 (1972).

[26] In *Virginia Electric Co.*, 46 FPC 299 (1971), the Commission rejected an attempt of the NAACP to challenge a $2 million increase in wholesale rates because of the pervasive employment discrimination

[footnote continued]

incurred in providing service to the public. Rather, they result from improper practices that are contrary to law and extraneous to the companies' essential public utility functions. While the FPC appears to concede that such costs may not legitimately be included in the rates its concession has no practical effect since it has no regulations and no procedures by which consumers may be protected from these needless expenses.[27] Clearly, as the Court of Appeals held, consideration of the costs of employment discrimination as they affect rates and services is within the Commission's jurisdiction and mandate.

This conclusion is fortified by the express provisions of the Commission's enabling legislation. Specifically,

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engaged in by the utility. In its brief to the Court of Appeals in the instant proceeding, the FPC appeared to have conceded (Brief for Respondent at 30, NAACP *et al.* v. FPC, 520 F.2d 432 (D.C. Cir. 1975)) that costs of discrimination could be challenged by interveners in a rate proceeding. The court astutely observed that: "It is obvious that a concession of this kind is not compatible with any flat statement that the Commission has no authority to consider the fact of employment discrimination in its public interest determination." Cr. Pet. App. D at 7.

[27] The mere assertion in the FPC's general instructions for its accounting regulations that all plant and operating expenses must be "just and reasonable", Pet. Br. at 25 n.17, merely restates the law and does not resolve which costs of discrimination, if any, must be excluded or the methodology of computing such costs. The exclusion of "penalties" as provided in Account 426.3, 18 C.F.R. Parts 101 *et seq.* (see Pet. Br. at 27 n.18) is irrelevant, because the kinds of relief that may be awarded in employment discrimination litigation, as described above, are generally considered to be in the nature of reparations rather than penalties or fines. The treatment of punitive damages, if available in such suits, may be covered by the FPC's penalty exclusion rule, but that is not entirely clear.

section 206(a) of the Federal Power Act provides that whenever the Commission finds that any "practice or contract" that affects the rates or charges for transmissions or sales subject to its jurisdiction is "unjust, unreasonable, unduly discriminatory or preferential," it is to "determine the just and reasonable . . . practice, or contract to be thereafter observed and in force." 16 U.S.C. §824e(a). Virtually identical language is found in section 5(a) of the Natural Gas Act, 15 U.S.C. §717d.

In *Boynton v. Virginia*, 364 U.S. 454 (1960) and *Mitchell v. United States*, 313 U.S. 80 (1941), the Court held that comparable language in the Interstate Commerce Act prohibits racial discrimination by common carriers in providing services. While those cases dealt specifically with service discrimination rather than employment, the Court noted in *Boynton* that the legislation "uses language of the broadest type to bar discriminations of all kinds," 364 U.S. at 457, and in *Mitchell* it found "no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach." 313 U.S. at 94. On its face, the explicit language of the Federal Power Act and the Natural Gas Act is equally sufficient to reach all forms of discriminatory practices that may affect utility rates, including discriminatory employment practices.[28] Thus, the FPC not only can and should disallow costs attributable to employment discrimination but is authorized by sections 205(a) of the Power Act and 5(a) of

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[28] *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), supports this view. There, the Court, considering similar nondiscrimination language in the Federal Aviation Act, assumed without hesitation that it would "protect job applicants or employees from discrimination on account of race." *Id.* at 723.

the Gas Act to govern affirmatively those practices in order to prevent illegitimate and improper costs from being passed on to the consuming public.

2. Financial Condition of the Industry

If costs associated with discriminatory practices in the utilities industry are more than nominal–and given the public record already established by the industry, there is reason to expect that they may be considerable[29] –the Commission may not be able to fulfill its public interest mandate simply by disallowing those costs in ratemaking. In the short run, that may indeed help to protect consumers from immediate increases in rates, but it will also result in diminished profits for shareholders. To be sure, the equitable nature of Title VII remedies renders it unlikely that any utility would actually be made insolvent and unable to continue operations as a result of an adverse judgment in a class action, no matter how bad the company's record might be. But it is not at all inconceivable that dividends might be missed, or bond ratings lowered, if substantial costs were disallowed and had to be absorbed by the company.

Any such consequences, especially in a setting where the financial health of utility companies is seen as "the greatest electric power problem confronting the industry and the Nation," Federal Power Commission, Fifty-Fourth

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[29] *See, e.g., Hearings, supra* note 4; U.S. Equal Employment Opportunity Commission. *Promise v. Performance* (1972); U.S. Equal Employment Opportunities Commission, Employment Patterns in the Utilities Industry, 1966-67, Research Rep. No. 1968-26 (1968); *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973), *modified sub nom., EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975).

Annual Report, Fiscal Year 1974 at 9 (1975), would have to be of real concern to the agency, which must also assure the industry's continuing ability to meet the need for services to the public.

In short, if Commission concern about discrimination is confined to the ratemaking stage the FPC may find itself faced with unacceptable alternatives: either to let ratepayers absorb the costs associated with discriminatory practices which, we submit, would violate the statute, or to impose them on the utility and its shareholders, which could impair the company's financial health. To avoid any potential adverse impact on the utilities' financial condition as well as the imposition of additional cost burdens on the public, the FPC would be well within its authority in taking basic preventive steps designed to assure that unlawful employment discrimination is not practiced by its regulatees.

3. Fitness and Qualifications of Licensees

Licensing is another function of the Commission in which consideration of fair employment practices is relevant. FPC licensees, as the recipients of substantial public benefits and privileges including the governmental power of eminent domain, must also be willing to accept public responsibilities such as compliance with national laws and policies forbidding employment discrimination. As the Court said in *FCC v. American Broadcasting Co.*, 347 U.S. 284, 289-90 n.7 (1954), "[t]he 'public interest, convenience, or necessity' standard for the issuance of licenses would seem to imply a requirement that the applicant be law-abiding."

The FPC's enabling legislation gives it broad authority to assure that its licensees are not and will not be engaging

in improper or illegal conduct. Under section 10(a) of the Federal Water Power Act, licenses are to be issued for hydroelectric projects only when in the Commission's judgment they "will be *best* adapted to a comprehensive plan" for waterway development "for the use or benefit of interstate or foreign commerce . . . and for other beneficial public uses, including recreational purposes." 16 U.S.C. §803(a) (emphasis added). The Commission may order modification of the project and impose whatever conditions it considers to be in the public interest. 16 U.S.C. §803(g). Certainly if would not be improper for the Commission to take account of an applicant's record of employment discrimination in determining whether its proposal is the "best" plan for development, or in giving preference to a competing applicant whose record is better.[30] "The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the 'public interest'. . . ." *Udall v. FPC*, 387 U.S. 428, 450 (1967).

Similarly, in issuing certificates of public convenience and necessity for construction of a natural gas pipeline or for the sale or transportation of gas under section 7 of the Natural Gas Act, the Commission has broad powers to protect the public interest, and in exercising these powers it must consider "all factors bearing on the public interest." *Atlantic Refining Co. v. FPC*, 360 U.S. 378, 391 (1959).

The desire to reduce air pollution, the national policy to stimulate investment in industry, national defense and

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[30] Similarly, a private applicant's poor record of compliance with the equal employment laws might be relevant to a determination that federal development of the project would be preferable. *Cf. Udall v. FPC*, 387 U.S. 428 (1967).

security, promotion of competition, and the dissemination of information to the public are all properly within the agency's scope of inquiry in certification proceedings. *See, e.g., FPC v. Transcontinental Gas Corp.*, 365 U.S. 1 (1961); *City of Chicago v. FPC*, 385 F.2d 629 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); *Alabama Power Co. v. FPC*, 511 F.2d 383 (D.C. Cir. 1974); *National Coal Ass'n. v. FPC*, 191 F.2d 462 (D.C. Cir. 1951); *Cf., FCC v. American Broadcasting Co., supra.* Nothing in the Act or in logic suggests that the national policy of nondiscrimination in employment is not similarly an appropriate matter for Commission concern in such proceedings.

The fact that the government is a major consumer of electric power and natural gas for the government's needs[31] underscores another reason for the Commission to consider whether the companies seeking authority to provide those services are in compliance with the equal employment laws. Federal regulations prohibit the government from contracting for goods or services with anyone engaged in discriminatory employment practices.[32] Because of the monopoly status of gas and electric utility companies, the government generally does not have an option in selecting suppliers of gas or electricity for its installations. Refusing to contract or terminating a contract is not a very realistic course of action when a NASA facility, for example, is involved.[33] While a suit against the utility is a possible

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[31] *See, e.g., National Coal Ass'n. v. FPC*, 191 F.2d 462 (D.C. Cir. 1951); *U.S. v. Mississippi Power and Light Co.*, 10 FEP Cases 1084 (S.D. Miss. 1975); *U.S. v. New Orleans Public Services, Inc.*, 8 FEP Cases 1089 (E.D. La. 1974).

[32] *See* Executive Order No. 11,246, as amended, 3 C.F.R. 169.

[33] *Cf. United States v. New Orleans Public Services, Inc.*, 8 FEP Cases 1089 (E.D. La. 1974).

alternative, it is a time consuming and costly procedure for both the government and the utility.[34] A far more effective way to insure that utilities are in compliance with the equal employment laws is during the licensing, certification and ratemaking processes.

Contrary to the FPC's assertion (Pet. Br. at 15), we are *not* advocating an "all-or-nothing" approach whereby any substantial evidence of discrimination would necessarily require the denial or termination of a license. A far better approach, in our view, would be to use the licensing process to examine the practices of the applicant and to impose any conditions that may be necessary to assure full compliance with the equal opportunity laws. In any event, it is evident that employment discrimination is one of many factors relevant to the Commission's public interest mandate in licensing.

C. The Laws Establishing Equal Employment Policy Do Not Vest Exclusive Jurisdiction in Any One Agency and In No Way Foreclose the FPC from Assisting in Eliminating Job Discrimination by Utilities.

The FPC contends that Congress has endeavored in the civil rights laws to centralize all government concern with the problems of employment discrimination in a single authority, the Equal Employment Opportunity Commission. Thus, FPC urges, it is effectively preempted from taking action in this area. Significantly, the FPC cites no statutory language and no legislative history in support of this argument, for neither are to be found.

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[34] *See United States v. Mississippi Power and Light Co.*, 10 FEP Cases 1084 (S.D. Miss. 1975), where the United States was awarded the taxable costs of the litigation.

Nothing in Title VII evinces any Congressional intent to limit the authority of agencies other than the EEOC from acting to promote the national policy of nondiscrimination.[35] As this Court has emphasized, Congress recognized in that law "the importance of a full arsenal of weapons to combat unlawful employment discrimination in the private as well as the public sector." *Johnson v. Railway Express Agency*, 421 U.S. 454, 468 (1975) (separate opinion of Marshall, Douglas and Brennan, JJ.). That judgment was strongly reaffirmed by Congress in the 1972 amendments to Title VII.[36] Indeed, in 1972 Congress

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[35] The limitation stated in Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d, *et. seq.*, partially precluding *that* title from covering employment practices certainly cannot be considered evidence of any national policy to centralize the entire government's concern with employment discrimination. Title VI, of course, is a general statute applying to a broad array of federal subsidies, grants and aid programs whose beneficiaries may have little or no other contact with the federal government. That title has nothing to do with the issues involved in this case, *i.e.*, the responsibilities of an economic regulatory commission with respect to rampant discrimination practiced by its regulatees. Even with the proviso in Title VI, it might be noted, in fact many grant-making agencies do prohibit employment discrimination by beneficiary organizations under both that title and related statutes. *See, e.g.*, 23 U.S.C. §324, 23 C.F.R. §25.1 *et. seq.* (DOT); 42 U.S.C. §3751, 42 C.F.R. §203 *et. seq.*; (LEAA); 31 U.S.C. §1242(a) 31 C.F.R. §51.326 (Treasury). *See also United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970).

[36] Pub. L. No. 92-261, 86 Stat. 103, 42 U.S.C. §2000e *et. seq.* The leading commentary on the legislative history of the 1972 amendments concluded that "congressional intent in adopting Public Law 92-261 clearly does not preclude resort to alternative enforcement mechanisms for equal employment opportunity, and in fact the actions of Congress reflect the contrary intent." Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity*

[footnote continued]

considered and rejected proposals to centralize in the EEOC the government's responsibilities for assuring equal employment opportunities,[37] instead opting to establish a new Council to promote coordination and cooperation among the numerous agencies that are involved in these problems.[38]

Congress was well aware of the actions taken and proposed by various economic regulatory agencies with respect to employment discrimination, and agency efforts in that regard were directly challenged in the debate on the floor of the Senate. Senator Hruska, sponsor of an amendment which would prohibit non-civil rights agencies from such activities, stated as follows:

> It is the [Equal Employment Opportunity Commission's] position that in addition to nonregulatory administrative agencies such as the National Labor Relations Board, Federal regulatory agencies such as the FCC and ICC similarly have the authority to regulate the employment practices of those who are subject to their jurisdiction.
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Act of 1972, 40 Geo. Wash. L. Rev. 824, 885 (1972). *See also* S. Rep. No. 92-415, 92d Cong., 1st Sess. 24 (1971); Joint Explanatory Statement of Managers at the Conference on H.R. 1746, *To Further Promote Equal Employment Opportunities for American Workers*, reprinted in U.S. Code Cong. & Admin. News, 92d Cong., 2d Sess. 2179. 2185 (1972).

[37] *See* J.A. 64.

[38] Pub. L. No. 92-261, 86 Stat. 111, 42 U.S.C. §2000e-14.

> Thus, in addition to all the other actions a respondent can be subjected to, the Commission would include Federal regulatory agencies in that already bulging list. It is apparently of no consequence to the Commission that such agencies have neither the requisite experience in the area of civil rights in employment, nor the knowledge, training, resources or investigative know-how to involve themselves in that area.

118 Cong. Rec. 3960 (Feb. 15, 1972). Senator Javits vigorously opposed this amendment because among other things, it would preclude regulatory agencies from considering employment discrimination in rate-making proceedings. *Id.* at 3962. The Senate's rejection of this amendment, and the subsequent elimination of a provision in the House bill to centralize all responsibility in the EEOC to implement and enforce the nondiscrimination laws in employment,[39] are strong indicators that Congress approved of the assumption of duties by agencies such as the FPC and FCC to consider evidence of discrimination by their regulatees.[40]

Practical experience with the implementation of fair employment law has confirmed the wisdom of Congress in refusing to accept proposals for preemption. The EEOC has been faced with a mounting backlog of complaints,

[39] H.R. 1746, §11. In the same year, 1972, Congress, enacting the State and Local Fiscal Assistance Act, did not include the employment exception in a Title VI-type provision requiring the Department of Treasury to prevent discrimination. *See* 31 U.S.C. §1242. That law has been construed to require Treasury to prevent job discrimination by its 39,000 state and local grantees. *United States v. City of Chicago*, 395 F. Supp. 329 (N.D. Ill. 1975).

[40] The EEOC, which has primary responsibility for interpreting and implementing the civil rights laws as they relate to employment

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apparently exceeding 100,000 in March, 1975. U.S. Commission on Civil Rights, V The Federal Civil Rights Enforcement Effort–1974 at 529 (1975). To resolve problems of discrimination in a timely and efficient manner the agency has increasingly espoused preventive measures including the enlistment of other federal agencies in the effort to curb discrimination. Where, as with the FCC, the cooperation and support of other agencies has been obtained, the overall result has been to ease the administrative burden and facilitate progress. See note 47, *infra*.

II.

IT WILL NOT IMPOSE AN UNDUE BURDEN ON THE FEDERAL POWER COMMISSION TO TAKE COGNIZANCE OF DISCRIMINATION BY ITS REGULATEES

The issue presented by the FPC to this Court is whether it lacks jurisdiction to take cognizance of employment discrimination by its regulatees in performing its duties under the Federal Power Act and the Natural Gas Act. Much of the argument in its brief, however, goes to a very different question–namely, the practical problem of

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discrimination, strongly supports the view that Title VII does not preclude or preempt responsible FPC action in this area. On the contrary, the EEOC has consistently underscored the need for and appropriateness of coordinate regulatory measures by the FPC, under its enabling legislation, in support of the EEOC's overall program. *See* J.A. 87-89. Similar expressions by the Justice Department and the United States Commission on Civil Rights provide further support, if any is needed, for the view that Title VII in no way preempts the authority of the FPC to consider employment discrimination in its regulation of the electric power and gas utilities. *See* J.A. 27-32; U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort 361 (1970).

how the FPC can meet its responsibilities in the light of existing constraints on its resources. Pet. Br. at 10, 24-31. Although this does not pertain directly to the Commission's statutory jurisdiction, a brief response to the Commission's expressed fears is in order.

We do not contend, and have never contended, that the FPC is obligated to act in a manner that would impair its ability to function or conflict with the efforts of any other agency, nor is any such result dictated by the Court of Appeals' decision. What we *do* say is that the FPC cannot exclude from its public interest determinations relevant evidence of illegal employment practices in the industries it regulates. Once this responsibility is accepted it is for the Commission in the first instance to determine the proper scope of its concern and how, in the light of *all* relevant factors including resource limitations, it may best address itself to those matters.[41] That sensible, practical and effective approaches to the problem may be found by an agency with the motivation to do so seems clear, contrary to the doom-saying attitude expressed by the Commission and the *amici* supporting it.[42]

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[41] To the extent the Court of Appeals felt there was some ambiguity in our position (Cr. Pet. App. D at 5), we wish to make clear that the proposed draft of a nondiscrimination regulation submitted with our 1972 rulemaking petition, modeled on the FCC common carrier regulations, 47 C.F.R. §21.307, was, indeed, a draft. It was included because the FPC procedural regulations appear to require specific proposals to accompany rulemaking petitions, 18 C.F.R. §1.7(b), and because we believed it to be helpful to the Commission as a starting point in its inquiry. But we have not taken the position that that particular proposal and no other be enacted.

[42] Innovative solutions have, of course, been developed by the FPC to deal with difficult regulatory problems of the past, once its

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First, nothing requires the FPC to take an "inflexible all-or-nothing" approach. *See* Pet. Br. at 15.[43] The FPC might well find that the imposition of appropriate conditions is a more coherent and effective way of dealing with discriminatory practices than the outright denial of a license or certificate.[44] This approach has been expressly approved by this Court in other contexts, and it is one with which the FPC obviously is familiar. *See, e.g., Atlantic Refining Co. v. FPC*, 360 U.S. 378 (1959); *FPC v. Idaho Power Co.*, 344 U.S. 17 (1952). In fact, a specific recommendation was made to the Commission in 1969 by one of its top legal officers that all licenses and certificates of public convenience and necessity be conditioned to bar employment discrimination and to require non-

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duty to do so became clear. *E.g., Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942). With respect to employment discrimination, in 1969 the FPC's then-Deputy General Counsel concluded that the FPC had a duty to act and recommended that the Commission undertake a number of specific measures, well within its competence, to deal with this increasingly apparent problem. See Memorandum to FPC Chairman from David J. Bardin, April 17, 1969 in *Hearings, supra* note 4 at 89 [Bardin Memorandum].

[43] The FPC argues that the sanctions available to it—withholding a license or denying a rate adjustment—are too strong for the problem involved here and "inconsistent with the remedial sanctions otherwise provided by Congress for such violations." Pet. Br. at 10. But Congress has provided for sanctions analagous to those possessed by the FPC, in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, where discrimination can result in the cut-off of federal funds.

[44] Other regulatory agencies have required utilities to undertake remedial programs as a condition of obtaining rate increases, rather than denying relief outright. *See, e.g., Potomac Electric Power Co.*, 83 PUR3d 209 (D.C. Pub.Serv.Comm. 1970).

discrimination clauses in major contracts relating to the construction or operation of FPC licensed or certificated facilities.[45]

Second, no one expects the Commission to do the impossible, or to solve the entire range of possible problems instantaneously. Certainly it would be futile for the FPC to attempt a full investigation of a company's employment practices in each ratemaking and licensing matter that comes before it each year, and we are not advocating such an approach. So long as the agency is endeavoring in good faith to meet its responsibilities, it seems to us that it might properly move forward on a step-by-step basis.[46] A rulemaking investigation such as we have suggested would allow the FPC to determine in a responsible fashion how its priorities should be ordered, where the most serious problems exist, and how its authority might most effectively be brought to bear on them. If additional resources are needed, Congress should certainly be alerted to that fact.[47]

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[45] Bardin Memorandum, *supra* note 42.

[46] An effort towards tailoring solutions to particular factual and operational variables in the several types of companies under FPC regulation might well be justified.

[47] The experience of the Federal Communications Commission suggests that substantial results may be obtainable without an enormous allocation of agency personnel or money. For example, in FY 1976 that agency allocated $400,000 to investigate complaints of employment discrimination by broadcasters, cable television systems, and common carriers, to review licensees' annual reports of employment patterns and generally to enforce the nondiscrimination rules of the FCC. Supt. of Documents, Special Analyses, Budget of the United States Government, Fiscal Year 1976 214 (1975). One factor in FCC's success has been its ability to enlist the aid of other

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Third, nothing requires the FPC to abandon sound administrative practices and management in dealing with the issues of employment discrimination. While the Court of Appeals' decision obviously recognizes a broader range of relevant matters, it does not dictate that "large masses" of irrelevant materials and evidence must be introduced into its proceedings. Pet. Br. at 24, 28.[48] In any event, the agency's administrative law judges need not relinquish their normal governance of the hearing process and the admission of evidence.

Fourth, there is no reason why the FPC's efforts to deal with employment discrimination should conflict with or duplicate the activities of other agencies. On the contrary, the effort should be to maximize cooperation and coordination. The FPC, of course, does not have the primary responsibility for implementing equal employment opportunity, but it does have important supportive functions and it must give consideration to this aspect of

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agencies and private organizations to monitor and, in appropriate cases, challenge industry compliance with its rules–just as the FPC's Deputy General Counsel recommended in 1969. See Bardin Memorandum, *supra* note 42. *Cf. Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994, 1003-05 (D.C. Cir 1966).

[48] To the contrary, the circuit court specifically suggested that the FPC might consider developing rule-of-thumb guidelines for use in ratemaking cases to avoid problems in quantifying in each case the productivity losses due to discriminatory practices. Cr. Pet. App. D at 27. A similar approach has been suggested by the General Services Administration. *See Hearings, supra* note 4 at 150. Nothing advanced by the FPC suggests that factors affecting the costs of discrimination are so different for each utility that employment of a rule-of-thumb would not be justified. If there is an argument to be made that use of such a rule would be inequitable, there will be ample opportunity for the FPC to consider it on remand.

national policy in performing its functions. While the Commission staff presently does not hold great expertise in employment discrimination matters, the FPC should recognize that it does have valuable expertise about the operations and practice of the power and gas industries that civil rights enforcement agencies such as EEOC lack. Deep concern and frustration about these industries have been manifested by the EEOC, the Justice Department, and the Civil Rights Commission, and all have joined in the effort to get FPC involvement in this area.[49] Precisely to avoid any waste of effort by the FPC and any undue burdens on the industries, we suggest that the FPC accept affirmative action plans filed with any other federal agency as *prima facie* sufficient, that it should utilize the data already prepared for use by other agencies to inform itself of the extent of discrimination in various segments of the industry, and that it should refer Title VII complaints to the EEOC and defer to proceedings before that agency. *See* J.A. 46-47.[50]

The appropriate framework for considering the responsibilities of an agency having jurisdiction over matters within the primary jurisdiction of another agency was established in *Alabama Power Co. v. FPC*, 511 F.2d 383 (D.C. Cir. 1974). Judge Leventhal's opinion provides a specific response to the claims of non-expertise and undue burden now raised by the FPC, *id.* at 393:

> Other agencies, having primary concern with enforcement of the antitrust statutes, are

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[49] *See Hearings*, *supra* note 4 at 65-67, 121-124; J.A. 87-89.

[50] The 1969 Memorandum of the Deputy General Counsel strongly urged that FPC could and should work closely with EEOC, Justice and other agencies. Bardin Memorandum, *supra* note 42.

> presumably able to assist the Commission by giving advice on disputed issues of antitrust policy and by identifying the factual questions relevant to an assessment of the anticompetitive impact of a proposed action. The opportunity for consistency and evenhandedness in the development of policy that Congress has put within the ken of several administrative bodies is enhanced when one agency elicits the views of another and draws upon the latter's expertise. Such a procedure would embody sound administrative practice. The Commission retains an obligation to give reasoned consideration to the bearing of anti-trust policy on matters within its jurisdiction (footnote omitted).

In short, there is no basis to presume, as the FPC does, that any efforts on its part to address employment discrimination by its regulatees in a responsible fashion will necessarily conflict with or duplicate the work of other agencies. To the contrary, sound precedent exists for the establishment of a rational system for interagency cooperation under which the FPC, without being deflected from its major responsibilities, can make an appropriate contribution to implementation of the national policy against employment discrimination.

III.

WHILE THE FPC HAS BROAD DISCRETION IN DECIDING TO PROCEED BY RULEMAKING OR ADJUDICATION IT MUST AT LEAST ESTABLISH AND ANNOUNCE A POLICY AGAINST EMPLOYMENT DISCRIMINATION BY ITS REGULATEES AND PRESCRIBE THE MINIMAL STEPS FOR IMPLEMENTING THAT POLICY.

Accepting a certain degree of responsibility, consistent with its statutory mandate to assure that the public is not burdened with discriminatory employment practices in the power and gas industries, will not destroy the Commission's ability to function, for as we have shown above, and as the Commission is well aware, a common-sense, pragmatic approach is what is called for. While the specific contours of what should be done is a matter that should be left to the agency's discretion in the first instance—not to the courts'[51] —that discretion is not unlimited and must be exercised in a rational, lawful manner.

In particular, we believe the FPC does have an obligation to issue an affirmative rule in some form, even if nothing more than a declaration that employment discrimination is a violation of its policy and a description of how that policy will be implemented. Insofar as the Court of Appeals suggested that the agency might properly proceed in this area entirely on the basis of case-by-case adjudications, without any prior articulation of general rules or policies, Cr. Pet. App. D at 33 n.53, we think it was in error.

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[51] In this regard, we think the Court of Appeals was wrong in stating that the particular draft regulations appended to our rulemaking petition would be "well beyond the Commission's power to adopt." Cr. Pet. App. D at 31. If the Commission does have jurisdiction to consider employment discrimination, as we think it plainly does, it has a broader discretion in determining what rules to institute, so long as they bear a rational relationship to the agency's legitimate objectives. We see no reason why the agency's rulemaking discretion should be constricted at this premature date—before it has even considered the matter in rulemaking proceedings—by decreeing that it could not, even if it wanted to, adopt a regulation for the receipt of complaints concerning violations of substantive nondiscrimination rules. This is not to say that such relief *must* be enacted, but only that it should be left to the Commission's initial determination.

The issue of whether agencies should make policy through rulemaking or adjudicative procedures is one of the recurring questions of administrative law. In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764-65 (1969) (plurality opinion), the Court said:

> The rule-making provisions of the [Administrative Procedure] Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application.... They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention. Apart from the fact that the device fashioned by the Board does not comply with the statutory command, it obviously falls short of the requirements of the Administrative Procedure Act. The "rule" created in *Excelsior* was not published in the Federal Register, which is the statutory and accepted means of giving notice of a rule as adopted; only selected organizations were given notice of the "hearing", whereas notice in the Federal Register would have been general in character; under the Administrative Procedure Act, the terms or substance of the rule would have to be stated in the notice of hearing, and all interested parties would have an opportunity to participate in the rule making (citation omitted).

The separate opinion of Mr. Justice Douglas in *Wyman-Gordon* detailed some of the policy reasons behind the APA's rulemaking provisions, *id.* at 777-79:

> The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. * * * Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice. See H. Friendly, The Federal Administrative Agencies 45 (1962).
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> Rulemaking is no cure-all; but it does force important issues into full display and in that sense makes for more responsible administrative action.

Here the Commission has consistently adhered to a policy not to consider evidence of employment discrimination by its regulatees in any of its regulatory functions. This policy, expressly set forth in a series of formal orders issued by the Commission,[52] is well known among the agency's regulatees as well as public and private agencies concerned with employment practices. If that policy is now to be reversed, as we believe it must, that is an action of general prospective applicability and broad consequence for the public as well as the FPC's industry constituents. The Freedom of Information Act, 5 U.S.C. §552(a), expressly requires that the agency publish in the Federal Register its "substantive rules of general applicability . . . and statements of general policy or interpretations of general

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[52] In addition to its orders in this proceeding (J.A. 54, 90), the FPC's policy has been articulated in *Virginia Electric Power Co.*, 46 FPC 299 (1971) (ratemaking) and *Pacific Gas and Electric Co.*, 44 FPC 1365, 1366-8 (1970) (licensing).

applicability formulated and adopted by the agency." Both the letter and spirit of the Administrative Procedure Act, 5 U.S.C. §551, *et seq.*, as well as sound practice, require that major changes in policies of this nature be accomplished through the public rulemaking process. As the Court stated in *Morton v. Ruiz*, 415 U.S. 199, 232 (1974), one of the central purposes of that act is to assure "that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations."

While the FPC does have broad discretion in determining the administrative means to perform its regulatory functions, we submit that, in this instance, it would be an abuse of that discretion to proceed exclusively by adjudication. *Cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). This is particularly so because of the broad importance and complexity of the matters involved, the Commission's exclusion of employment discrimination issues in past adjudications, the widespread expressions by government and private agencies of concern and interest in assisting the Commission develop policy in this area, and the particular interest of minorities and the poor in these issues.[53] A decision that some form of rulemaking–if only the issuance of a statement of revised policy–is necessary, would hardly restrict the agency's broad discretion. It could still rely upon case-by-case adjudication as a principal means of developing information and experience needed to flesh out its policies and revise and develop its procedures.

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53 *See* Bonfield, *Representation for the Poor in Federal Rule Making*, 67 Mich. L. Rev. 511, 512 (1969).

The FPC may in its discretion decide at the rulemaking stage to develop more fully its policies and procedures in this area in the interests of achieving a prophylactic effect, particularly since it professes apprehension about the administrative burdens of case-by-case adjudication. That is for the FPC to decide. But to do less, we submit, would be an abuse of discretion.

IV.

THE FPC'S FAILURE TO RESPOND TO THE UNLAWFUL EMPLOYMENT PRACTICES OF ITS REGULATEES RAISES SERIOUS CONSTITUTIONAL QUESTIONS

A conclusion by this Court that the Federal Power Act and the Natural Gas Act do not confer jurisdiction on the FPC to deal with employment discrimination by its regulatees would necessitate an exploration of the FPC's constitutional obligation to prevent such discrimination. Such an exploration would raise serious and complex constitutional questions of the kind the Court traditionally has sought to avoid where a sound statutory basis exists for the relief sought. *See, e.g., Dandridge v. Williams*, 397 U.S. 471 (1970); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Ample statutory basis exists here, which should enable this Court to adhere to its wise policy of avoiding unnecessary constitutional adjudication. Nevertheless, we proceed to outline the constitutional issues involved in this case if it is not resolved on statutory grounds.

The constitutional duty we assert is of great importance but is limited in scope. Its importance and limitations derive from the facts that (A) protection here is sought against race and sex discrimination rather than some other impingement on the interests of citizens, and the

duty is asserted against a governmental and not a private entity; and (B) the governmental involvement here shown has a significant tendency to facilitate and reinforce private discrimination.

A. Where Protection is Sought Against Racial Discrimination and the Conduct of a Government Agency is at Issue, the Test of State Action is Less Onerous Than in Other Cases.

Our claim here is limited to the contention that a governmental entity may not in any way aid or support a denial of "equal protection of the law," "a more explicit safeguard of prohibited unfairness than 'due process of law' . . ." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Since the guarantee is more explicit in cases involving race and sex discrimination, the test of "state action" is less onerous. This differential standard recently was described by the Court of Appeals for the Second Circuit in *Jackson v. Statler Foundation*, 496 F.2d 623, 628-29 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975):

> It is noteworthy that several courts have considered claims that the activities of tax-exempt organizations constitute "state action." Significantly, these cases divide into two camps: where racial discrimination is involved, the courts have found "state action" to exist; where other constitutional claims are at issue (due process, freedom of speech), the courts have generally concluded that no "state action" has occurred. . . . This dichotomy is explained in part by the double "state action" standard which has been recognized—one, a less onerous test for cases

> involving racial discrimination, and a more vigorous standard for other claims" (citations omitted).[54]

This "double standard" derives from the history of the Fourteenth Amendment which is "unquestionably designed to condemn and forbid every distinction, however trifling, on account of race." *Oregon v. Mitchell*, 400 U.S. 112, 127 (1970).[55] It rests upon a recognition that "racial discrimination is so pecularily offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action'

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[54] *See also Weise v. Syracuse University*, 522 F.2d 397, 406 (2d Cir. 1975) ("Class-based discrimination is perhaps the practice most fundamentally opposed to the stuff of which our national heritage is composed, and by far the most evil form of discrimination has been that based on race. It should hardly be surprising, then, that in race discrimination cases courts have been particularly vigilant in requiring the states to avoid support of otherwise private discrimination, and that where the conduct has been less offensive a greater degree of tolerance has been shown"); *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1142 (2d Cir. 1973); *Lefcourt v. Legal Aid Society*, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971); *Powe v. Miles*, 407 F.2d 73, 81-82 (2d Cir. 1968); *Pitts v. Department of Revenue*, 333 F. Supp. 662, 668-69 (E.D. Wisc. 1971).

[55] *See also Bright v. Isenbarger*, 314 F. Supp. 1382, 1393 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971) ("... as evidenced by the central meaning of the Fourteenth Amendment and the multiplicity of civil rights laws, our society, speaking authoritatively through its laws, has set itself against discrimination on the basis of race. On the other hand, the origins and central meaning of the Fourteenth Amendment and our basic societal values, as expressed by our laws, do *not* indicate that the constitutional requirement of due process which establishes the framework of the relationships between government and individuals should also be the standard for relationships between private individuals and organizations") (court's emphasis).

with respect to it than would be required in other contexts. . . ." *Coleman v. Wagner College*, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring). *Cf.* Mr. Justice Rehnquist dissenting in *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973), and in *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 177 (1972).

Application of this differential standard would avoid some of the concerns expressed by the court below (*see* Cr. Pet. App. D at 30) and by the petitioners (*see* Pet. Br. at 36-38) about the ramifications of a conclusion that the FPC must take action to curb racial discrimination in the gas and electric utility industry. It would not follow, as the FPC claims, that "the entire panoply of rules for the enforcement of due process and equal protection will be placed upon the shoulders of each agency for separate enforcement." Pet. Br. at 36. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), for example, it did not follow that because the state was responsible for the racially discriminatory policies of the Eagle Coffee Shop it also would be responsible to insure that Eagle accorded any employee it discharged a due process hearing. And in *Norwood v. Harrison*, 413 U.S. 455, 464 n.7 (1973), the Court recognized a distinction between governmental responsibility when the issue involves separation of church and state and when racial discrimination is at stake:

> The leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools. "State support of segregated schools through any arrangement, management, funds or property cannot be squared with the [Fourteenth] Amendments' command that no state shall deny to any person within its jurisdiction,

> the equal protection of the laws." *Cooper v. Aaron*, 358 U.S. 1, 19 (1958).

It is also important to recognize that the issue here concerns the duty of a *governmental entity*, the FPC, not whether the activities of a private institution are sufficient to constitute state action and thus create constitutional responsibilities.[56] *Cf. Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

This fact further narrows the parameters of our constitutional claim. As noted by Judge Henry Friendly, dissenting in *Jackson v. Statler Foundation, supra* at 637:

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[56] The Court of Appeals misconstrued respondents' argument. The court characterized our claim in these words:

> Petitioners' claim founded on the Constitution is that it not only empowers but also requires the Commission to proscribe employment discrimination by regulatees. This is because the actions of the regulated companies are assertedly "state action" and therefore subject to the Fifth Amendment's prohibition of racial discrimination.

Cr. Pet. App. D at 27. But it is clear from our brief below that we were asserting a duty on the part of the FPC and not arguing that the Commission's regulatees were engaged in "state action." See Brief for Petitioners at 57-59, NAACP *et al.* v. FPC, 520 F.2d 432 (D.C. Cir. 1975). It is noteworthy, however, that there are situations in which utilities have argued that they are engaged in "state action." *See, e.g., Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971), where VEPCO claimed that certain of its actions were exempt from the anti-trust laws under the exception excluding "state action" from coverage. The court held that although the state regulatory Commission did not investigate or approve the practices in question, its silence meant approval and the requisite "state action" was present to merit exemption from the anti-trust laws. *See also Gas Light Co. of Columbus v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).

"[a] holding that an otherwise private institution has become an arm of the state is much broader and can have far more serious consequences than a determination that the state has impermissibly fostered private discrimination."[57] This distinction, between acts of the government itself and conduct of private entities that is treated as tantamount to government action, has been applied by this Court. Much more is required when the quest is to clothe a private institution with the mantle of the government. The Court has insisted upon a "close nexus between the State and the challenged action . . .," *Jackson v. Metropolitan Edison Co., supra* at 351–so close that it must amount to a "symbiotic relationship," *Moose Lodge No. 107 v. Irvis, supra* at 175. This more stringent test is based on the legitimate concern to avoid obliterating the distinction between private and government action except where the

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[57] *See also* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activities,* 74 Colum. L. Rev. 656, 698-99 (1974):

> Decisions in suits to enjoin private persons must take into account the rights and interests asserted by the challenged party. The state support or promotion must, therefore, be significant enough to justify imposition of restraints on those private rights and interests involved in the challenged activity as well as on state support (or promotion). Where the state itself can be sued to enjoin its support, however, no consideration of private rights is required. . . .
>
> Thus, suits against the private person and suits against government for injunctive relief should involve quite different considerations. The former require that government's interest be significant enough to justify restricting the private interest as well. But in suits against government, no private interest is at stake, and thus none can be asserted to retard full relief against the state support.

government has "significantly involved itself with invidious discriminations." *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967).[58]

On the other hand, where a governmental agency has been sued directly for facilitating racial discrimination, this Court has ruled that there need be "no precise causal relationship" between the state involvement and the capacity of the private entity to engage in discrimination. *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973). All that is required is that there be some "significant tendency to facilitate, reinforce, and support private discrimination." *Id.* at 466. *See also Lombard v. Louisiana*, 373 U.S. 267 (1963); *Peterson v. Greenville*, 373 U.S. 244 (1963); *Turner*

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[58] Thus, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the Court was called upon to decide whether governmental involvement in the activities of a private social club located in a private building was sufficient to warrant impinging upon the associational rights of the members of the club. In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), there were a great variety of enterprises subject to the same regulatory scheme as electric utilities. Imposing constitutional obligations on electric utilities also presumably would have meant that "the actions of a lone Philadelphia cab driver could also be fairly treated as those of the State of Pennsylvania" (*id.* at 350 n.7). Here there would be no such anomaly; the companies involved are large enterprises whose regulations results from their effect upon interstate commerce. In addition, there is little reason to fear that the industry will be seriously burdened by a vigorous requirement of equal opportunity, unlike the burden that would have fallen on utilities in *Jackson v. Metropolitan Edison Company, supra*, if they were required to have elaborate service termination proceedings. Here the industry regulated is already subject to a network of nondiscrimination laws. Requiring the FPC to recognize its constitutional responsibilities would add to the burdens of the gas and electric utility industry only to the extent that compliance with the national policy against discrimination would be more certainly assured.

v. City of Memphis, 369 U.S. 350 (1962); *McCabe v. A., T. & S.F. Ry. Co.*, 235 U.S. 151 (1914); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974).[59]

B. The FPC's Involvement With Private Utilities Facilitates, Reinforces and Supports Discrimination.

As we have shown, this is not a case which invokes the more rigorous standards of "state action" that are appropriate when the interests at stake are of a nonracial nature or when a more far reaching intrusion in private activity is sought by clothing a private entity with the

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[59] Lower courts also have recognized that there is a need to distinguish between the governments' duties and responsibilities with respect to discrimination and those of private entities. *See Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom., Coit v. Green*, 404 U.S. 997 (1971); *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970) (preliminary injunction), *appeal dismissed*, 398 U.S. 956 (1970), 400 U.S. 986 (1971); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972). Contrary to the claim of the FPC (Pet. Br. 34-36), the court's decision in *Green v. Kennedy* that the Treasury Department was prohibited from affording tax benefits to private segregated schools was not grounded on a finding of "state action" with respect to the private schools. This was made clear in the court's decision on the merits (*Green v. Connally, supra* at 1164). Under IRS's 1970 construction of the Internal Revenue Code, referenced by that court (Rev. Rul. 71-1447, 1971-72 Cum. Bul. 230-31), the IRS ruled that tax exempt status would be denied to all private schools that do not have nondiscriminatory admission policies. No condition was set that the operation of the private school be deemed "state action."

See also Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967), where the state was precluded from contracting with contractors from whose labor forces blacks were banned, without any conclusion that the contractors were engaged in "state action."

mantle of government. Nevertheless, as Chief Justice Burger indicated in *Norwood v. Harrison, supra,* at 465-66, even in cases of the type now before the Court it is necessary to show that governmental involvement has had "a significant tendency to facilitate, reinforce, and support private discrimination." A number of factors present here meet the "significant tendency" test.

1. The insulation of private utility companies from price competition facilitates and supports private discrimination. As we have shown, an employer's decision to engage in racial or sexual discrimination results in a less efficient labor force and adds to the cost of doing business.

The costs of race and sex discrimination have become so patent (see note 17, *supra*) that if utilities were operating in a competitive market, costs alone might induce them to eliminate discriminatory employment practices. But a gas and electric utility industry shielded from competition need not be concerned with reducing costs except insofar as the regulatory agency prevents inefficiently incurred costs from being passed on to the consumer. Protected status, therefore, facilitates and supports the discriminatory practices of the gas and electric utility industry and is a major contributing factor accounting for this industry ranking last in the employment of blacks among the 23 largest industries in America (J.A. 13).

Protected status also immunizes the gas and electric utility industry from the public pressures that frequently are employed to promote equal employment opportunity in other industries. *See* D. Bell, Race, Racism and American Law, Chs. 7, 14 (1973). It may be possible to boycott grapes and lettuce but, absent a fondness for kerosene lamps and pot belly stoves, a boycott of a discriminatory gas or electric company seems hardly likely. Were the gas

and utility industry subject to the normal forces of the marketplace, public pressures might be exerted to affect the industry's employment practices. But the government has facilitated the ability of the industry to discriminate by removing the threat of competition and the economic mechanisms by which public pressure might be exerted.

2. There are unique and special rights and benefits provided under the Federal Power Act and the Natural Gas Act that so deeply involve the government with gas and electric utility companies that it can fairly be said that the government is supporting private discrimination. For example, the court below, in noting a difference between this case and *Jackson v. Metropolitan Edison, Co., supra,* pointed out that some of the FPC's regulatees "are actually situated 'upon . . . the public lands and reservations of the United States.' 16 U.S.C. §797(e)(1970)." Cr. Pet. App. D at 27-28, n.48. Discrimination by such companies inevitably would be viewed as supported by the government. Similarly where, as here, private companies are afforded the power of eminent domain (15 U.S.C. §717f(h); 16 U.S.C. §814)—an historic governmental power—it is plain that governmental involvement has much more than a "significant tendency" to support and reinforce the conduct of these companies. As Mr. Justice Rehnquist noted in *Jackson v. Metropolitan Edison Co., supra* at 352-53: "[i]f we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."

3. Discrimination is supported and reinforced when the FPC, having undertaken a general responsibility to prevent unjust costs from being passed on to consumers, abjures responsibility for dealing with costs attributable to

racial or sex discrimination. It is one thing when the duty invoked on behalf of a group of claimants would, if assumed by the agency, place it in conflict with its duties to the general public. As noted by Mr. Justice Marshall, this might have been the case in *Jackson v. Metropolitan Edison Company, supra*, where the benefits of due process hearings afforded a few customers would have come into conflict with the interests of consumers in general in avoiding undue expenses. *Id.* at 373 (Marshall, J., dissenting). But it is quite another thing for an agency to seek to avoid a duty whose assumption is thoroughly consistent with its general mandate to serve the public. For the FPC to concede as it does that it has general responsibility to prevent unjust costs from being passed on to consumers, but then to exclude from that responsibility costs due to race or sex discrimination, amounts to direct state action of the most discriminatory kind.

For the government to so single out race problems, to treat them differently from related governmental interests, clearly constitutes a suspect racial classification. *Hunter v. Erickson*, 393 U.S. 385 (1969); *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971). The FPC's failure to act, despite overwhelming evidence of the extent of discrimination and its own recognition of the problem,[60] and despite continuous importuning to do

[60] *See Hearings, supra* note 4, where the Chairman of the FPC and other agency officials were questioned about the extent of discrimination in the gas and electric utility industry and what the FPC could do to combat it. See also *Pacific Gas and Electric Company*, 44 FPC 1365, 1368 (1970), where the FPC noted that the "problems of equal opportunity in employment are not matters of first impression to the Commission" and urged "all electric and gas suppliers, whether investor owned, publicly owned or cooperatively owned, to take all measures needed to implement this national policy [that discrimination in employment be eliminated] fully and completely."

so,[61] differs little from the affirmative approval of the practices at issue by the regulatory agency in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952).[62]

[61] In addition to the twelve organizations who petitioned the FPC in this case (note 1, *supra*), the FPC has been requested to act against employment discrimination by a committee of the House of Representatives (House Comm. on the Judiciary, 92d Cong., 2d Sess., Report of the Civil Rights Oversight Subcommittee, "Civil Rights Responsibilities of the Federal Power Commission," (Comm. Print 1972)), by the Chairman of the Equal Employment Opportunity Commission (Cr. Pet. App. D at 4-5) and by the United States Commission on Civil Rights (I Civil Rights Enforcement Effort—1974 233-35 (1974)).

[62] *Cf. Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248, 252 (4th Cir. 1971), where the court refused to equate "administrative silence with abandonment of administrative duty. It is just as sensible to infer that silence means consent, i.e., approval."

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be modified, (a) to require the FPC to issue a rule articulating its basic policy against discrimination and the general procedures to be employed in its implementation and (b) to permit the FPC to consider adoption of all methods of implementation rationally related to its legitimate objectives, and, as modified, affirmed.

Respectfully submitted,

HOWARD A. GLICKSTEIN
Howard University Law School
1935 Upton Street, N.W.
Washington, D.C. 20008

WILLIAM L. TAYLOR
Catholic University Law School
Washington, D.C. 20064

REUBEN B. ROBERTSON III
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Counsel for Respondents in 74-1619 and Cross Petitioners in 74-1608

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